



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ESC Corporation
File: B-232037
Date: November 23, 1988

DIGEST

1. The contracting agency's determination that the protester's proposal was technically unacceptable was not unreasonable where the proposal failed to provide adequate information which was required by the solicitation and necessary for the proper technical evaluation of the proposal, and where rectification of those deficiencies would require major revisions to the proposal.

2. Where contracting agency found none of the proposals received in response to a small business set-aside to be technically acceptable, it was not improper for the contracting officer to withdraw the set-aside, cancel the request for proposals and resolicit the requirement on an unrestricted basis.

DECISION

ESC Corporation protests the decision of the Naval Underwater Systems Center (NUSC), to withdraw request for proposals (RFP) No. N66604-88-R-1622 as a total small business set-aside, to cancel the solicitation, and to resolicit the requirement on an unrestricted basis. The protester requests that the unrestricted solicitation be ~~cancelled~~ and that the set-aside be reinstated and competition allowed to proceed under it. ESC further requests ~~award~~ of the costs of preparing its proposal and of pursuing this protest, as appropriate.

We deny the protest and the claim for costs.

The contracting installation, NUSC, functions in part as the technical design and in-service engineering agent for the Submarine Operational Training and Assessment Program (SOTAP) and, as such, is responsible for the development of operational support training and component assessment

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programs and for the continuing development of submarine combat systems. The subject solicitation was issued as a 60-month indefinite quantity, cost-plus-fixed-fee contract for support assistance in NUSC's development, introduction, certification and update of its operational training and guidance, as well as its assessment procedures. The record indicates that this solicitation is a single follow-on contract to replace three existing SOTAP contracts.

Of three solicitations issued for these services by the Navy over a period of 6 years, this is the first that the agency has set aside for small business concerns. The determination to do so was made, the Navy states, on the basis of its belief that at least three small businesses were capable of performing the work required. None of those three firms responded to the RFP although two of them were among the subcontractors proposed by the three offerors. Subsequent to the agency's evaluation of initial offers, however, it withdrew the set-aside, canceled the solicitation, and resolicited the requirement on an unrestricted basis because of its determination that none of the proposals received offered the level of personnel and corporate resources necessary to manage and perform the contract as the prime contractor.

The agency subsequently obtained the concurrence of both the NUSC Small Business Specialist and the Small Business Administration (SBA) Procurement Center Representative for the Boston Regional Office in its withdrawal of the set-aside for the lack of small business competitors capable of performing the contract.

ESC was advised of the withdrawal of the set-aside determination by a letter from the contracting officer who stated that he had done so under Federal Acquisition Regulation (FAR) § 19.506 because ". . . none of the proposals [has] a reasonable chance of being selected for award." ESC requested and was granted a debriefing, following which it filed this protest in which it contended that the Navy's "disqualification" of its proposal was "plainly wrong" because it excluded consideration of ESC's proposed subcontractors. ESC argued that since the proposal of at least one small business offeror--itself--was technically acceptable, the set-aside restriction should be reinstated and the competition concluded on a set-aside basis. In its final comments, following its receipt of the agency's report and a bid protest conference, ESC additionally alleged that all proposals had been improperly rejected based on an undisclosed criterion that each prospective prime contractor must be capable of performing at least 51 percent of the contract work at time of award.

Under FAR § 19.506, a contracting officer is authorized to withdraw a small business set-aside if he determines that an award to a small business concern would be "detrimental to the public interest." We regard the withdrawal of a set-aside as a business judgment which should not be disturbed unless there is a clear showing that the contracting officer abused his discretion. SEAVAC International, Inc., B-231016, B-231457, Aug. 11, 1988, 88-2 CPD ¶ 134. We will not question such a decision where an SBA representative has concurred in the withdrawal action, as here, and there is no convincing evidence of arbitrary or capricious action. The Quality Inn Midtown, B-219312.3, B-221231, Apr. 4, 1986, 86-1 CPD ¶ 324. We have specifically held that it was not improper for the contracting officer to remove the set-aside restriction where all small business technical proposals received are technically unacceptable. Electronic Warfare Assocs., B-224504, B-223938, Nov. 3, 1986, 86-2 CPD ¶ 514.

Here, ESC argues that the determination that its technical proposal was unacceptable was flawed. Although it suggests that maybe the case as to the other two offerors as well, since only ESC has protested to our Office only the rejection of its proposal is before us.^{1/}

With regard to the evaluation of proposals, section M (evaluation criteria) of the solicitation required that proposals contain a response to each of the areas identified in section L ("Instructions, Conditions, and Notices to Offerors") that pertain to the evaluation factors for award, which were technical capabilities and cost in descending order of importance. The technical capabilities portion of the proposal was to be subdivided into three categories: (a) Technical Approach, (b) Personnel Resources (Staffing and Management Plan), and (c) Corporate Resources (Experience and Facilities). The technical proposals were point scored in each of these three categories to indicate one of the following ratings:

- (a) Highly Acceptable
- (b) Acceptable

^{1/} One of the other offerors who participated in the bid protest as an interested party "concurs" in ESC's protest and is of the view that its proposal was improperly evaluated in a manner similar to ESC's.

(c) (Unacceptable but) Susceptible to Being Made
Acceptable^{2/}

(d) Unacceptable

A summary rating and a narrative overview of that rating were also provided for each technical proposal.

ESC's technical proposal was rated as follows:

<u>Category</u>	<u>Rating</u>	<u>Score</u>	<u>Evaluated Rate Range</u>
1. Technical Approach	Susceptible	60	50-69
2. Personnel Resources	Unacceptable	<50	0-49
3. Corporate Resources	Acceptable	70	70-89

ESC bases its view that its proposal was found to be technically acceptable upon the point scores it received and upon a statement to that effect allegedly made by the contracting officer's technical representative to ESC representatives at the protester's debriefing.

The Navy denies that it told the protester at the debriefing that its proposal was technically acceptable, because it was not.^{3/} It was the judgment of the evaluation committee that ESC's proposal would have required major revisions to be made acceptable, as would those of the other two offerors.

^{2/} Although not reflected in the rate listing, as shown in the contracting officer's June 13, 1988, request for a technical proposal evaluation, paragraph 6 of that document makes clear that the standard meaning of the "susceptible" rating is that because of major technical deficiencies in one or more categories, the rating is actually "unacceptable" unless and until revisions are made to remedy those deficiencies.

^{3/} It appears that the protester may have misunderstood statements made at the debriefing regarding the evaluation of its proposal. However, even if, as the protester alleges, a contracting official stated that ESC's proposal was technically acceptable, the technical evaluation clearly shows otherwise.

In light of these determinations, the Navy maintains that its decision to withdraw the small business set-aside, cancel the solicitation, and resolicit on an unrestricted basis was a reasonable and proper exercise of its administrative discretion.

The agency notes that of the requirement's total estimated level of effort of 281,908 hours, ESC proposed to provide only 14,908 (or less than 5 percent) of those hours with its current resources. Of the remaining 267,000 hours, it proposed to provide 41 percent through subcontractors and more than 50 percent by newly hired personnel. Those newly hired personnel would include 19,000 hours out of 22,000 hours (or approximately 86 percent) for the key personnel category of Senior Analyst/Senior Engineer. In the non-key labor category, Engineer/Analyst, ESC proposed to provide only 3 percent of the 37,111 required hours, with the remaining 97 percent to be obtained through new hires and subcontractors. In the key personnel category of Program/Project Manager, ESC proposed a new hire for approximately 18 percent of the required 19,516 hours.

In light of the small amount of personnel it proposed to provide from its own resources and the substantial percentage of newly hired personnel ESC proposed to hire in order to satisfy the solicitation requirements, the technical evaluation committee concluded that the firm lacked sufficient expertise to perform or even manage the work required.

Furthermore, in all of these instances, ESC failed to identify key personnel it proposed to hire or state their qualifications, even though it was supposed to have done so under clause L39 of the RFP which required that offerors ". . . list all personnel proposed for assignment as Key Personnel^{4/} [and] [i]nclude [the] completed personnel qualification sheets . . . [r]esumes, and other supporting data . . ." demonstrating their qualifications. Similarly, as to certain non-key categories, clause L39 also required the offeror to provide a "listing of personnel" who must meet minimum qualifications stated elsewhere in the solicitation, and if such personnel were not then employed by the offeror, the offeror was required to provide the basis for its assumption (letters of commitment, for example) that such named personnel "will be available to the offeror if the proposal is accepted."

^{4/} "Key Personnel" were specified as (1) Program/Project Manager (two minimum); (2) Senior Analyst/Senior Engineer (four minimum); and (3) Senior Training Specialist (two minimum)

The Navy maintains that ESC's failure to comply with these RFP requirements contributed to its unacceptable rating. Indeed, ESC's proposal indicates that with respect to approximately 27,000 out of 62,120 hours for key personnel and 130,043 of 219,746 hours for specified non-key personnel, ESC's proposal, as submitted, required that NUSC accept "on faith" that if awarded the contract the protester would produce adequate qualified new hires at the time performance was to commence. The agency argues that it should not be required to assume such a risk.

ESC is of the view that despite the agency's alleged improper evaluations, because its proposal was rated as susceptible of being made acceptable in the category of technical approach, acceptable in the category of corporate resources, and unacceptable "only" in the category of personnel resources (allegedly because the technical evaluation committee "disregarded subcontractor contributions to . . . team technical capability" as proposed), its proposal was acceptable, or at the least could have been made acceptable had the agency conducted discussions and allowed it to revise its proposal.

The determination of the technical acceptability of proposals is the responsibility of the contracting agency in the exercise of its discretion. Since it is the contracting agency that must bear the burden of any difficulties incurred because of a defective evaluation, it is our position not to question that determination unless the protester demonstrates that it was clearly unreasonable. Electronic Warfare Assocs., B-224504, B-223938, supra.

The protester does not dispute that it was heavily dependent on subcontractors and new hires to staff the contract and that its proposal failed to comply with the RFP requirements to provide information as to the identity and qualifications of all required key personnel and the identity of other specified non-key personnel and evidence of the availability of such employees who were not then in the employ of the offeror.

Generally, if an offer, as submitted, is technically unacceptable or so deficient in information required by the solicitation that it would necessitate major revisions to become technically acceptable, the contracting agency is not

obligated to conduct discussions with that offeror concerning the inadequacies of its offer. The Associated Corp., B-225562, Apr. 24, 1987, 87-1 CPD ¶ 436; Electronic Warfare Assocs., B-224504, B-223938, supra, at 6. Rather, it is incumbent upon the offeror to exercise due diligence in the preparation and submission initially of a complete and adequately written proposal or risk rejection of its offer. See La Pointe Industries, Inc., B-222023, May 14, 1986, 86-1 CPD ¶ 461; Center for Employment Training, B-203555, Mar. 17, 1982, 82-1 CPD ¶ 252.

Thus, we concur with the agency that it was not obligated to assume the risk inherent in accepting ESC's "blanket offer" to provide qualified newly hired employees when necessary, particularly in light of the very specific informational requirements regarding certain personnel categories and the highly technical requirements of the proposed contract.

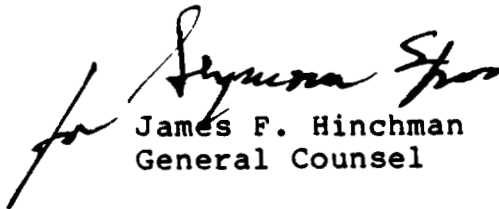
Concerning the protester's allegation that, based on the ratings received in the three technical capabilities categories, its proposal was, in fact, found technically acceptable or susceptible of being made acceptable, we think it is significant that in the only category in which its proposal was found acceptable--corporate resources--the evaluation committee stated that "the ESC team is rated as 70 based solely on the work of the well qualified sub-contractors." (Emphasis added.) Thus, the low-end "acceptable" rating in this one category was not actually based upon ESC's "in-house" resources, but upon the expertise of its subcontractors. With respect to the firm's own corporate resources to perform the contract, it was found unacceptable.

Based upon a statement made in the evaluation committee's report to the contracting officer the protester also has asserted that its proposal was improperly rejected for failing to meet an undisclosed evaluation criterion that it, as the potential prime contractor, must perform at least 51 percent of the contract. Although the committee did observe that none of the three offerors was in a position to perform at least half of the work we note, with respect to ESC, that such a figure was not even approached and the committee's comment must be read in the context of an offeror who proposed to perform less than 5 percent of the work with its own resources and was dependent on new hires--whose identity, availability and qualifications were unknown at the time of proposal submission--for performance of more than half the labor hours.

Thus, based on the above, we find that the protester's objections to the Navy's evaluation of its proposal are without merit.

Finally, because we find the Navy's evaluation of ESC's proposal reasonable and because none of the other small business proposals received in response to the procurement was found technically acceptable, we find that the contracting officer did not abuse his discretion by withdrawing the small business set-aside and resoliciting the requirement on an unrestricted basis. Electronic Warfare Assocs., B-224504, B-223938, supra. Since we find ESC's protest to be without merit, its request for proposal preparation costs and the costs of pursuing its protest is denied. 4 C.F.R. § 21.6(d)(e) (1988).

The protest and the claim are denied.


James F. Hinchman
General Counsel